

## **THE REPORT OF THE STANDING ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE**

In part, the impetus for this proposal came from two opinions of the Supreme Judicial Court: *Sang Hoa Duong v. Commonwealth*, 434 Mass. 1006 (2001), and *Commonwealth v. Ly*, 450 Mass. 16 (2007).

The issue in *Sang Hoa Duong* was whether a single justice of the SJC erred in denying the defendant's request for a stay of execution of sentence pending appeal. The Court noted:

The present case illustrates the complexity of the appellate procedure concerning applications for stays of execution of sentence pending appeal and the large number of judges on different courts who may rule on such applications. The Commonwealth urges us to revise the process. Although we have stated that "it may be preferable for a single justice of this court to decline to act on a request for a stay pending appeal, leaving (or perhaps transferring) the issue in the court where the underlying appeal will be heard," *Commonwealth v. Aviles*, 422 Mass. 1008, 1009-1010, 664 N.E.2d 448 (1996), citing *Commonwealth v. Allen*, supra at 497, we have not limited the discretion of the single justice of this court to consider new applications, such as the one in this case. Whether we should adopt a different procedure should first be considered by this court's rules committee. The committee may wish to review rule 6 [of the Rules of Appellate Procedure] and rule 31 in light of this decision and consider whether any revisions are warranted.

434 Mass. at 1008.

The process in the *Duong* case illustrates the problem. After conviction and sentencing, the defendant filed a notice of appeal and moved the trial judge to stay the sentence of imprisonment. The motion was denied and the defendant filed a similar motion in the Appeals Court, where his appeal was pending. A single justice of that court also denied the motion. The defendant then filed with a single Justice of the Supreme Judicial Court a petition under G.L. c. 211 § 3, together with an appeal under Rule 6(a) of the Rules of Appellate Procedure, seeking a stay of execution. The single justice denied relief, and in the *Duong* opinion the full court affirmed.

The defendant in *Duong* presented the issue of a stay pending appeal to three separate judges before he got the full bench of the Supreme Judicial Court to consider the issue. He could have taken up more judicial resources if he had wanted to take the time, since the ordinary course of review of a decision by a single justice of the Appeals Court is to a full panel of that court, with the opportunity to seek further review in the Supreme Judicial Court.

*Ly* concerned a defendant who was released on a Rule 31 motion and whose conviction was subsequently affirmed, but who remained free for sixteen years because no one took any steps to revoke the stay of execution. The issue in *Ly* was whether the defendant could be remanded to serve his sentence given the long period of delay. In the opinion, the Court noted that "Neither the rule, nor our cases, indicate whether, in the normal course of events (now or then), the clerk's

office informally notifies the district attorney of its receipt of the rescript, or whether the district attorney must bring the matter to the court's attention by way of a formal motion to revoke the stay of execution of sentence.” 450 Mass. at 19.

The Court’s Standing Advisory Committee on the Rules of Criminal Procedure has recommended several amendments to both rules. The major changes to the procedure they cover include:

- (i) A clarification of the route a litigant must take to appeal from a trial judge’s decision on a motion to stay the execution of the sentence. The proposed revisions to Criminal Rule 31(a) and Appellate Rules 6(b)(1) and 6(b)(3) make clear that after the trial court, the next step is to present the issue to a single justice of the court where the appeal will be heard and then to the appellate court in which the appeal is pending. The decision of the panel of the Appeals Court (or in the event of an appeal originally lodged in the Supreme Judicial Court, the full bench) would be final.
- (ii) An explication in proposed Appellate Rule 6(b) (2) of the amount of time the Commonwealth has to respond to a motion for a stay presented in an appellate court. This proposal responds to a problem brought to the attention of the Committee by a number of prosecutors, concerning the practice of some defense counsel filing a motion for a stay together with their brief on the merits, resulting in a single justice ordering the Commonwealth to respond to the motion on short order, without the full time they would ordinarily have to consider the merits of the defendant’s arguments.
- (iii) The automatic expiration of a stay of execution upon the release of a rescript affirming a conviction, unless extended by an appellate court, in proposed Criminal Rule 31 (b) and Appellate Rule 6(b)(2). A rescript is “released” when it is announced to the public and the parties are given notice of the decision. The Committee chose that date rather than the date when the rescript “issues” and the judgment enters in the trial court because the appellate court releasing the rescript is in the best position to determine whether a continued stay of execution is warranted by the now-reviewed claims of errors. The Committee felt that, as a defendant has a higher motivation to flee once it becomes likely that the conviction will be affirmed and the likelihood of the conviction eventually being overturned is much more remote, the default should be expiration of the stay.
- (iv) A description of the process by which the defendant is brought back to the trial court for the execution of sentence. Proposed Criminal Rule 31(b) places on the Commonwealth the obligation of moving in the trial court for the execution of sentence once the stay has expired. Ordinarily, the court will give the defendant notice by mail of the date of the hearing where sentence will be executed, but the prosecutor may request that the court issue an arrest warrant in an appropriate case. To ensure that cases do not slip between the cracks, as in *Ly*, proposed Criminal Rule 31(b) places on the defendant a continuing obligation to inform the trial court of his or her current address. It also requires the trial court clerk to notify the appellate court whenever a stay has been granted in the trial court. That

is important because proposed Appellate Rule 6(b)(6) requires the appellate clerk to notify the parties in all cases where a stay is in force that the stay has expired when the court announces a rescript affirming a conviction, unless that appellate court determines otherwise.

The Committee was unanimous in its support for a revision of that part of Appellate Rule 6 that deals with the topics mentioned in (i) and (ii) above. A minority of the Committee, however, opposed the changes in the procedure for the termination of stays, both in Criminal Rule 31 and Appellate Rule 6, specifically the creation of an automatic termination of the stay and more importantly the triggering of this automatic termination being the “release” rather than the “issuance” of the rescript.

What follows is the text of the proposed amendments to each rule, marked up to show the changes, the proposed Reporter’s Notes to each amendment, and the statements of the minority.

### **Proposed Criminal Rule 31 Showing Revisions and Deletions**

#### KEY TO REPORTER'S CONVENTIONS

Original language = regular typeface

~~Strikethrough~~ = removed

**Bold** = addition to rule

#### **Rule 31. STAY OF EXECUTION; RELIEF PENDING REVIEW; AUTOMATIC EXPIRATION OF STAY.**

(a) Imprisonment. If a sentence of imprisonment is imposed upon conviction of a crime, the entry of an appeal shall not stay the execution of the sentence unless the judge imposing it or, **pursuant to Mass. R. App. P. 6, a judge single justice** of the ~~Supreme Judicial Court or Appeals Court~~ **court that will hear the appeal**, determines in ~~his~~ **the exercise of** discretion that execution of said sentence shall be stayed pending the determination of the appeal. If execution of a sentence of imprisonment is stayed, the judge ~~or justice~~ **may** at that time make an order relative to the custody of the defendant or for admitting ~~him~~ **the defendant** to bail.

(b) **If the application for a stay of execution of sentence is allowed, the order allowing the stay may state the grounds upon which the stay may be revoked and, in any event, shall state that upon release by the appellate court of the rescript affirming the conviction, stay of execution automatically expires unless extended by the appellate court. Any defendant so released shall provide prompt notice to the clerk of the trial court regarding the defendant’s current address at all times. The clerk shall notify the appellate court that will hear the appeal that a stay of execution of sentence has been allowed. At any time after the rescript is released by the appellate court, the Commonwealth may move in the trial court to execute the sentence. The court shall schedule a prompt hearing and issue notice thereof**

**to the defendant unless the prosecutor requests, for good cause shown, that a warrant shall issue.**

~~(b)~~ **(c) Fine.** If a reservation, filing, or entry of an appeal is made following a sentence to pay a fine or fine and costs, the sentence shall be stayed by the judge imposing it or by ~~a judge of the Supreme Judicial Court or Appeals Court~~ **a single justice of the court that will hear the appeal** if there is a diligent perfection of appeal.

~~(c)~~ **(d) Probation or Suspended Sentence.** An order placing a defendant on probation or suspending a sentence may be stayed if an appeal is taken.

### **Proposed Reporter's Notes to Criminal Rule 31**

Subdivision (a). This Rule was revised in 2008. As originally adopted in 1979, it codified existing practice under G.L. c. 279 § 4, which governed the procedure for a stay of execution pending appeal prior to the adoption of the Rules of Criminal Procedure.

Practice in the Commonwealth is that sentences are not routinely stayed pending appeal. *See Hagen v. Commonwealth*, 437 Mass. 374, 378 (2002). However, where a defendant meets the appropriate requirements, it has been a long standing tradition to grant a stay in the interest of justice, to avoid imprisoning one whose conviction may not survive appellate review. *See Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 513 (1979).

A judge should order a stay only when the defendant has met the two concerns which guide the exercise of discretion in this area. The first and most important is the likelihood of the defendant establishing on appeal that the conviction will be overturned. *Cf. Commonwealth v. Stewart*, 413 Mass. 664 (1992) (bail pending appeal is not appropriate if the only consequence of the defendant's success would be reducing the term of his sentence and not immediate discharge). This requirement does not demand that the defendant establish that the appeal is more likely than not to be successful, only that it presents "an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal." *See Commonwealth v. Hodge*, 380 Mass. 851, 855 (1980); *Commonwealth v. Allen*, 378 Mass. 489, 498 (1979). In this respect, the Massachusetts practice is more liberal than its federal counterpart. *Compare* 18 U.S.C. 3143(b)(1)(B) (the defendant must establish that the appeal "raises a substantial question of law or fact likely to result in" a favorable outcome).

The other factor that informs a judge's exercise of discretion in granting a stay is the question of security: whether the defendant will flee, commit another crime or present a danger to the community. *See Hodge*, 380 Mass. at 855. The same facts that are relevant to the decision to grant a defendant bail prior to trial are pertinent in this context as well. *See Allen*, 378 Mass. at 498.

In granting a stay, a judge may impose appropriate conditions on the defendant's release. *Cf. Commonwealth v. Beauchemin*, 410 Mass. 181, 186 (1991) (defendant not leave his home and

have no minor visitors). G.L. c. 276 § 87 can be used as a vehicle for having the probation department monitor the defendant's conduct during a stay.

The trial judge may entertain a motion for a stay either before or after the entry of an appeal. Whether the judge grants or denies the motion, no statement of reasons is necessary nor must the judge make any particular finding or certification. *See Allen*, 378 Mass. at 1034.

This Rule does not address stays of execution of a sentence when an appeal is not pending. *See Commonwealth v. McLaughlin*, 431 Mass. 506, 518 (2000) (raising but not deciding the question of a judge's inherent power to stay a sentence for other reasons).

Subdivision (b). Stay orders must inform the defendant of the conditions upon which they were issued. Mandatory conditions include the defendant's continuing obligation to provide the court with a current address and to prosecute the appeal in a diligent manner. *See Mass. R. A. P. 6 (b)(4)*. The court should craft whatever additional conditions are appropriate to each case.

The stay automatically expires when the appellate court considering the appeal releases a rescript affirming the conviction, unless the appellate court states otherwise. An appellate court could decide, in its discretion, to extend a stay of execution pending a petition for rehearing, application for further appellate review, or petition for certiorari *sua sponte*, or upon the motion of the defendant, made either prior to or after the court's decision. A rescript is "released" when it is announced to the public and the appellate court notifies the parties that the court has decided the case. *Cf. Mass. R. App. P. 23* (requiring the clerk of the appellate court to mail the parties a copy of the rescript and the opinion, if any). In the ordinary course of events, the rescript "issues" twenty-eight days following the release date or upon the denial of any petition for rehearing or application for further appellate review, whichever is later. *Id.*

In order to ensure that the clerk of the appellate court can notify the parties that a stay has automatically expired, *see Mass. R. App. P. 6 (b)(6)*, the clerk of the trial court must notify the appellate court whenever a stay is granted.

Once a rescript affirming the conviction is released, the burden is on the Commonwealth to initiate the process for the sentence to be executed. *See Commonwealth v. Ly*, 450 Mass. 16, 20 (2007). This requires the prosecutor to file a motion with the trial court and for the court to schedule a hearing and notify the defendant. The court should schedule the hearing promptly. *Id.* at 22. If possible, the prosecutor should agree on a date for the hearing with the defendant's current counsel (in most cases that will be the lawyer who represented the defendant on appeal). The procedure for ensuring the defendant's appearance at the hearing to execute the sentence is modeled after the one described in Rule 6 (a). Ordinarily, the court should simply issue a notice to the defendant of the time and date of the hearing. The prosecutor, however, may accompany the motion for a hearing with a request that the court issue a warrant for the arrest of the defendant. If the prosecutor's submission establishes good cause to believe that a warrant is necessary in order to ensure the defendant's appearance, the court may order the defendant's arrest.

Subdivision (c). This subdivision departs from federal rule in that a stay of the payment of a fine is mandatory under this rule. This provision was adopted in recognition of the difficulty a defendant has, upon the successful appeal of his judgment, in recovering money he has paid in satisfaction of a fine.

Subdivision (d). This subdivision was originally based, in part, on Fed. R. Crim. P. 38(a)(4) and upon G.L. c. 279 § 4.

### **Proposed Appellate Rule 6 Showing Revisions and Deletions**

#### KEY TO REPORTER'S CONVENTIONS

Original language = regular typeface

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**Bold** = addition to rule

#### Rule 6. Stay or Injunction Pending Appeal

##### **(a) Civil Cases.**

**(1)** Stay Must Ordinarily be Sought in the First Instance in Lower Court; Motion for Stay in Appellate Court. In civil cases, an application for a stay of the judgment or order of a lower court pending appeal, or for approval of a bond under subsection ~~(b)(1)~~ **(a) (2)** of this rule, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal, ~~or in criminal cases, a motion for a stay of execution of a sentence~~ must ordinarily be made in the first instance in the lower court. A motion for such relief may be made to the appellate court or to a single justice, but the motion shall show that application to the lower court for the relief sought is not practicable, or that the lower court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the lower court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other statements signed under the penalties of perjury or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the appellate court to which the appeal is being taken (provided that if the court be the Supreme Judicial Court, the motion shall be filed with the clerk of the Supreme Judicial Court for Suffolk County).

##### ~~(b) Civil Cases~~

~~(1)~~ **(2)** Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties. Relief available in the appellate court under this rule may be conditioned upon the filing of a bond or

other appropriate security in the lower court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety thereby shall submit ~~himself~~ to the jurisdiction of the lower court and irrevocably appoint the clerk of the lower court as ~~his~~ **an authorized** agent upon whom any papers affecting ~~his~~ liability on the bond or undertaking may be served. ~~His~~ **A surety's** liability may be entered against ~~him~~ **the surety** on motion in the lower court without the necessity of an independent action. The motion and such notice of the motion as the lower court prescribes may be served on the clerk of the lower court, who shall forthwith mail copies to the sureties if their addresses are known.

~~(2)~~ **(3) Terms.** Relief available in the appellate court under this rule, or denial of such relief, may be conditioned on such reasonable terms as the appellate court or single justice may impose. For failure to observe such terms, the appellate court or single justice may make such further order as it or he deems just and appropriate.

~~(c)~~ **(b) Criminal Cases.** A motion for a stay of execution of a sentence shall be governed by paragraph ~~(a)~~ **(b)** of this rule and by Massachusetts Rules of Criminal Procedure 31. ~~If a defendant fails at any stage to take any measure necessary for the hearing of an appeal or report, a stay of execution of a sentence may, on motion of the Commonwealth, be vacated.~~

**(1) Stay Must Ordinarily be Sought in the First Instance in Lower Court; Motion for Stay in Appellate Court.** In criminal cases, an application for a stay of execution of a sentence **pending appeal** must ordinarily be made in the first instance in the lower court. A motion for such relief may be made to the ~~appellate court or to a single~~ **justice of the appellate court to which the appeal is being taken**, but the motion shall show that application to the lower court for the relief sought is not practicable, or that the lower court has **previously** denied an application **for a stay** or has failed to afford the relief which the applicant requested with the reasons given by the lower court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other statements signed under the penalties of perjury or copies thereof. With the motion shall be filed such parts of the record as are relevant. ~~Reasonable notice of the motion shall be given to all parties.~~ The motion shall be filed with the clerk of the appellate court to which the appeal is being taken (provided that if the court be the Supreme Judicial Court, the motion shall be filed with the clerk of the Supreme Judicial Court for Suffolk County).

**(2) Reasonable Notice.** Reasonable notice of the motion for a stay shall be given to the Commonwealth. If the motion is filed at least 30 days prior to the filing of the appellant's brief, the time for a response shall be governed by Rule 15. If the motion is filed at any other time, the Commonwealth shall have 30 days to respond. A single justice may shorten or extend the time for responding to any motion authorized by this Rule.

**(3) Appealability of Single Justice Order. Finality.** An order by the single justice allowing or denying an application for a stay may be appealed to the appellate court in which the appeal is pending. An order by the appellate court in which the appeal is pending, allowing or denying an application for a stay, shall be final.

**(4) Revocation of Stay Pending Appeal.** If a defendant fails at any time to take any measure necessary for the hearing of an appeal or report, a stay of execution of a sentence may, on motion of the Commonwealth, be ~~vacated~~ **revoked**.

**(5) Expiration of Stay.** Upon the release of the rescript by the appellate court of a judgment affirming the conviction, the stay of execution of sentence automatically expires, unless extended by the appellate court.

**(6) Notice of Expiration of Stay.** Upon release of a rescript affirming the conviction, the clerk of the appellate court shall notify the clerk of the trial court and the parties that the conviction has been affirmed and that therefore, the stay of execution of sentence has automatically expired.

~~(c) Criminal Cases. A motion for a stay of execution of a sentence shall be governed by paragraph (a) of this rule and by Massachusetts Rules of Criminal Procedure 31. If a defendant fails at any stage to take any measure necessary for the hearing of an appeal or report, a stay of execution of a sentence may, on motion of the Commonwealth, be vacated.~~

### **Proposed Addition to the Reporter's Notes to Appellate Rule 6**

This Rule was revised in 2008 to describe more fully the procedure for obtaining a stay of execution of a criminal sentence in an appellate court. It complements Rule 31 of the Rules of Criminal Procedure.

The 2008 amendment clarified the appellate process for stays of execution of a criminal sentence pending an appeal. As in civil cases, requests for a stay must first be presented to the trial court, unless such an application is not practicable. Either the defendant or the Commonwealth may seek relief from a single justice of the court that will hear the appeal concerning the trial judge's decision to deny, *e.g.*, *Commonwealth v. Aviles*, 422 Mass. 1008 (1996), or grant, *e.g.* *Commonwealth v. Hodge*, 380 Mass. 851 (1980), a stay. Only the parties may do so. *See Hagen v. Commonwealth*, 437 Mass. 374, 375 (2002) (crime victim lacks standing to request revocation of stay). In the ordinary course of events, for all but first-degree murder cases a single justice of the Appeals Court is the appropriate forum. The single justice does not review the decision of the trial judge, but considers the matter *de novo*. *See Commonwealth v. Allen*, 378 Mass. 489, 497 (1979). After the single justice decides the issue, there is only one further step in the process: an appeal to the panel of the Appeals Court that will decide the merits, or the full bench of the Supreme Judicial Court if the case will be decided there. This changes prior practice, which allowed a party aggrieved by the decision of a single justice of the Appeals Court the option of seeking relief both by appealing the decision in that court and asking a single justice of the Supreme Judicial Court to entertain the matter. *See e.g.*, *Duong v. Commonwealth*, 434 Mass. 1006 (2001). The appeal from the decision of the single justice may be accompanied by a motion for an expedited ruling. *See e.g.*, *Restucci v. Commonwealth*, 442 Mass. 1045 (2004).



As also provided in Mass. R. Crim. P. 31, a stay of execution of sentence automatically expires when the appellate court considering the appeal releases a rescript affirming the conviction, unless the appellate court decides to extend it. A rescript is “released” when it is announced to the public and the appellate court notifies the parties that the court has decided the case. *Cf.* Mass. R. App. P. 23 (requiring the clerk of the appellate court to mail the parties a copy of the rescript and the opinion, if any). In the ordinary course of events, the rescript “issues” twenty-eight days following the release date or upon the denial of any petition for rehearing or application for further appellate review, whichever is later. *Id.*

When a rescript is released affirming a conviction, the clerk of the appellate court, in addition to the obligation that Mass. R. App. P. 23 imposes, shall notify the parties and the trial court clerk that the stay of execution of sentence has automatically expired. If the defendant wishes to apply for a new stay, in order to seek a rehearing or further appellate review, such a request should go to the appellate court that decided the case (either the panel of the Appeals Court or the full bench of the Supreme Judicial Court).